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No. 88-1719

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391,
Petitioner,

v.

THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. The Nature of the Duty of Fair Representation Action in Relation to Traditional Actions

A. In our opening brief, we began our analysis of the Seventh Amendment question presented here by "compar[ing] the statutory action [involved in this case] to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity," *Granfinanciera v. Nordberg*, —— U.S. ——, 57 U.S.L.W. 4898, 4900 (June 23, 1989) (quoting *Tull v. United States*, 481 U.S. 412, 417-418 (1987)), to ascertain whether the modern action is "analogous to [18th century] 'Suits at common law'" or is "analogous to

18th-century cases tried in courts of equity or admiralty," *Tull v. United States*, 481 U.S. at 417. *See* Brief for Petitioners ("Pet. Br.") at 11-22.

We showed there that the modern duty of fair representation ("DFR") action (derived by implication from § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a)), is most analogous to a traditional trust action. In such actions, the equity courts defined and enforced the duties of "trustees"—who had been granted discretionary powers for the benefit of a group of third parties (often including parties with competing interests vis-a-vis one another) and who were not subject to the plenary control of those third parties—and the rights of the trust beneficiaries. As we emphasized, the common law recognized no rights comparable to the equitable rights of such trust beneficiaries. Pet. Br. 12-20. We showed, too, that the DFR action—as an action "to set aside a final and binding determination of a grievance . . . [and thus to] direct[ly] challenge . . . the private settlement of disputes," *United Parcel Service v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring)—is analogous to a traditional bill in equity seeking to vacate an arbitrator's award for unfairness in the proceedings. Pet. Br. 20-22.

B.(1) It is helpful in sorting out the respondents' rejoinder—and the parties' positions generally—to begin with the points *not* in dispute. Respondents do not dispute that a labor union under NLRA § 9(a) (like a traditional trustee) has been granted discretionary powers for the benefit of third parties,[1] or that the third parties (like traditional trust beneficiaries) may often have competing interests. Nor do respondents dispute that em-

[1] To be sure, respondents repeatedly—and somewhat disingenuously—characterize DFR actions simply as "Section 301 actions," referring to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and entirely ignore the action's derivation from the NLRA. *See e.g.*, Resp. Br. 7 n.2. As the decisions of this Court reaffirm, a DFR claim—even when raised with a § 301 claim against an employer—is based on NLRA § 9(a), and is implied from the grant of exclusive representation status found in that provision. *See DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983) ("The suit against the employer rests on § 301, . . . [t]he suit against the union is one for breach of the duty of fair representation, which is implied under the scheme of the National Labor Relations Act."). *See also id.* at 164 n.14; *Communications Workers v. Beck*, —— U.S. ——, 56 U.S.L.W. 4857, 4858 (June 28, 1988); *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1979).

ployees have no legal right to direct the actions of a union with respect to any particular exercise of the union's discretionary authority (just as beneficiaries have no such rights over trustees), and that employees must rely instead on the union's good-faith judgments as to how to advance the employee group's interests and as to how the individual employees' competing interests are to be harmonized (just as beneficiaries must rely on the good-faith judgments of trustees). And, indeed, respondents do not even dispute that the particular kind of claim here—an allegation that the union retained the power to control and settle employee claims and exercised that power in bad faith—is closely parallel to a traditional trust law claim that a trustee failed to properly pursue a beneficiary's equitable claims; nor do they dispute that the two actions are adjudicated in a quite similar way. *Compare* Pet. Br. 12-20 *with* Resp. Br. 22-24.

(2) Respondents do part company from us as to the fair reading of *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), this Court's seminal duty of fair representation decision. In this regard, respondents argue that the *Steele* opinion does not support the DFR-trust analogy. Resp. Br. at 22-23.

The *Steele* Court, in reaching the conclusion that a duty of fair representation is implicit in the Railway Labor Act's grant of exclusive representation powers to unions, relied on the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to

exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." 323 U.S. at 202. As we have seen, while the law of trusts dealt with the regulation of "a *granted* power to act on behalf of others" there was no such concept at common law. Thus, *Steele*, we believe, is direct support for our position. Respondents raise three objections.

Respondents first characterize this part of the *Steele* opinion as merely a "passing observation of the *Steele* Court." Resp. Br. 23. But a fair reading of the opinion makes clear that the Court was, in this passage, explaining the primary rationale for its holding. The *Steele* Court proceeded by first stating the case, 323 U.S. at 193-197, reviewing the decision below, *id.* at 197-198, and outlining the relevant provisions of the Railway Labor Act and their purposes, *id.* at 198-201. At that juncture the Court faced the question of the "fair interpretation of the statutory language," *id.* at 202-203. In determining that the Act created a fair representation duty the Court relied on two interpretive guides: the *first* is the "general principle" quoted above, *id.* at 202, the second is the Constitution's equal protection guarantee, *id.* Thereafter, the Court turned its attention to the limited nature of the duty, *id.* at 203, and to the procedural and remedial questions raised by a complaint alleging a breach of the duty, *id.* at 203-208. Respondents' "passing reference" characterization is thus utterly unfaithful to the *Steele* opinion's language and structure.

Respondent next urges that *Steele*'s "general principle" should be discounted since the Court did not explicitly cite to the law of trusts. But this assertion does not advance the argument so much as a millimeter. For neither did the Court explicitly refer to the common law. Thus the question here is whether, in fact, the "general principle" referred to in *Steele* is a principle that was developed in the law courts or in the courts of equity. For the reasons

given in our opening brief, we say that the principle was developed in Equity and there alone. Numerous commentators agree. *See* Pet. Br. at 15, 19-20 and nn. 7 & 8 (citing and quoting academic commentary and judicial opinions noting analogy). Indeed, Justice Jackson—a member of the *Steele* majority—in elaborating on the *Steele* principle, later made the connection to the law of trusts *in haec verba*:

> The Act makes the majority union "the exclusive representatives of all the employees in such unit" for bargaining. 49 Stat. 453, § 9(a), 29 U.S.C. § 159(a). . . . While the individual is thus placed wholly in the power of the union, it does not follow that union powers have no limit. Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed to represent. *The National Labor Relations Act . . . indicates no purpose to excuse unions from these wholesome principles of trusteeship.* [*Trailmobile Co. v. Whirles*, 331 U.S. 40, 68 (1947) (Jackson, J., with whom Frankfurter, J., joins, dissenting on other grounds) (emphasis added). *See also id.* at 68-69 (quoting analogous language in *Steele*).]

Perhaps most to the point, the respondents do *not* point to any common law base for the particular "general principle" on which *Steele*—and the duty of fair representation—rest.

(3) Respondents argue in the alternative that the DFR-trust analogy is undermined because cases after *Steele* have looked to principles of national labor policy, rather than trust law, in developing the fair representation duty. *See* Resp. Br. at 23-24 (citing *Electrical Workers v. Foust*, *supra*, and *Bowen v. Poastal Service*, 459 U.S. 212 (1983) as examples of cases which formulated rules of DFR law from national labor policy rather than from trust analogies). Again respondents argument is beside the point.

As we explained in our initial brief (Pet. Br. 21-22), the argument that, for Seventh Amendment purposes, trust law is the most appropriate analogy to the law of the duty of fair representation does *not* presuppose that trust law and DFR law form a single entity or that the DFR law must, in any particular, follow the preexisting trust law rule. Rather, we proceed on the understanding that Seventh Amendment doctrine requires that modern statutory actions be analogized to more traditional actions in order to determine the jury trial question. At the same time, we recognize that the elaboration of modern statutory law should rest on the intent of Congress and the needs and dictates of Congress's policies. *See United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 63 (duty of fair representation is "creature of labor law"). In the latter regard, trust law analogies are only an instructive starting point, as *Steele* itself shows.

(4) Respondents argue that this Court's decisions regarding the borrowing of a proper statute of limitations for DFR suits show that the proper analogy here is not the law of trusts but the law of "legal malpractice, a legal action with tort and contract components." Resp. Br. 20-21; *see also id.* at 24 (discussing *United Parcel Service v. Mitchell*, *supra*, and *DelCostello v. Teamsters*, *supra*). Respondents focus on two points: first, that in these cases, the Court did not even consider borrowing a trust law statute of limitations; and, second, that the Court—in *refusing* to borrow either the legal malpractice limitations rules or the rules from any other common law action—noted that legal malpractice appeared to be the "closest state law analogy" for purposes of borrowing a limitations period. *DelCostello*, *supra*, 462 U.S. at 167.

We submit that respondents' search for significance in the Court's failure to mention trust law—in deciding a case presenting a very different issue—is *not* a sensible way to find the right analogy here. The Court in *Mitchell* and *DelCostello* was after all conducting an entirely distinct search for analogies from that which is called for in the Seventh Amendment context. Those cases involved inquiries into which modern state law cause of action would supply *policies of repose* that would best effectuate federal labor policy. Thus, such issues as the nature of the federal interest in repose, the length of the state statutory repose periods, and the consistency of repose practices from state to state all were of paramount importance. *See e.g.*, *DelCostello*, *supra*, 462 U.S. at 161, 165-166, 167-168, 170-172. Here, none are relevant.

Given these factors, it is hardly surprising or significant that no party urged a trust law analogy in *Mitchell* or *DelCostello* or that the Court never mentioned such an analogy. While federal labor policy regarding repose places a high priority on the "need for uniformity," clear cut rules, and the relatively rapid disposition of labor disputes (*DelCostello*, *supra*, 462 U.S. at 171; *Mitchell*, *supra*, 451 U.S. at 70-71), the pattern of modern state trust law statutes of limitation serves none of these concerns.[2]

Of at least equal importance, for present purposes the legal malpractice analogy is *not* persuasive in its own terms. A comparison of the relative rights and duties of a client and her lawyer, on the one hand, and the relative rights and duties of an employee and her union, on the other, demonstrates that while the DFR-trust law analogy fits the latter situation, the malpractice analogy does not.

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[2] Although modern trust actions are normally subject to statutes of limitations, rather than to laches, the nature and length of the limitations periods vary widely from state to state. G. Bogert & G. Bogert, The Law of Trusts and Trustees, § 950 (rev. 2d ed. 1982). For example, some states have different limitations periods for express trusts and implied trusts, some have different limitations periods based on the subject matter of the trust, and some assign trust cases to statutes governing "suits in equity" or "causes of action not expressly provided for." *Id.* The length of the periods also vary widely, and some are quite long. *Id.*

For example, a client normally chooses her own lawyer for herself, directs the lawyer's actions within very broad bounds, and is able to terminate the relationship at will. *See generally* 7 Am. Jur. 2d, *Attorneys at Law*, § 168 (2d ed. 1980) (client may terminate attorney-client relationship at any time, with or without cause); *id.* §§ 179, 181 (client has "ultimate control over the subject matter" of a case and may compromise, settle, adjust or dismiss without consent of attorney); *id.* § 213 (scope of attorney's authority is determined by client). Beneficiaries normally have no such rights of control with respect to a trustee. 1 A. Scott, Law of Trusts § 8 (4th ed. 1987). Similarly, individual employees do not have such rights of control with respect to a union.

Moreover, an attorney generally cannot represent classes of clients with varied and possibly divergent interests without each client's consent. 7 Am. Jur. 2d, *Attorneys at Law*, § 197. A trustee, in contrast, may be granted discretionary powers with respect to a class of beneficiaries with competing interests. *See* 1 Restatement (Second) of Trusts, §§ 183, 187, 232, 233 (1959). And a union generally acts for—and must exercise discretion on behalf of—a class of employees with competing interests. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *see generally* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 21 (1958) (union's duty is modeled on that of a trustee charged with "acting for the benefit of a large and ever changing group of beneficiaries who may have divergent interests").

In essence, then, DFR law, like trust law, regulates a beneficial relationship quite different from one of simple agency, while the lawyer-client relationship is one specialized aspect of the law of agency. *See* 7 Am. Jur. 2d, *Attorneys at Law*, § 119; 1 A. Scott, *supra*, § 8. A lawyer simply has no general autonomy to assess and balance the divergent interests of a diverse class or to

act contrary to the lawful wishes of a client; in contrast, trustees and unions normally do have such autonomy.

C. In our opening brief, we showed that DFR suits like the one here—as actions "to set aside a final and binding determination of a grievance," *Mitchell, supra*, 451 U.S. at 66 (Stewart, J., concurring)—are analogous to 18th century actions to vacate an arbitrator's award for unfairness in the proceedings, and that the latter actions were within the exclusive province of Equity. Pet. Br. 20-21.

Respondents reply that there are DFR actions that do not involve arbitration proceedings. Resp. Br. 24. Although this point is true, we do not see how it counters our argument. To say that other cases do not involve setting aside arbitration awards and hence are not analogous to such equity cases is not to say that this case does not involve setting aside such an award (for it does) or that our analogy does not hold (for, given the facts, it does hold).[3]

Respondents next contend that this case cannot be analogized to an action to set aside an arbitration award in Equity because proceedings before the joint employer-union grievance committees established to resolve disputes under this agreement are not the equivalent of proceedings before a neutral arbitrator. Resp. Br. 24 n.8. *See also* TDU Br. 4-11. Again, respondents miss the point. This Court has time, and time again, treated these two grievance settlement systems as *legally identical*. *See*

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[3] In a passage that can only be described as incomprehensible, respondents urge that this DFR case should not be viewed as analogous to an action to set aside an award because "the 'setting aside' of the [arbitration] decision is automatic upon meeting the [relevant DFR] standards." Resp. Br. 25. Of course, this is a restatement of our point, not its refutation. Because a DFR suit is designed as a means of setting aside a previously final award, the action is precisley analogous to a traditional suit in Equity to remove the bar presented by an arbitration award.

Drivers Union v. Riss & Co., 372 U.S. 517 (1963); *see also DelCostello, supra*; *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *cf.* 29 U.S.C. § 203(d).[4]

D. Much of respondents' brief is an effort to build a monument to *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dairy Queen v. Wood*, 369 U.S. 469 (1962); and *Ross v. Bernhard*, 396 U.S. 531 (1970). According to respondents, these decisions should control the outcome of this case. In essence, respondents would have it that these cases create a presumption in favor of characterizing any given cause of action as legal and entitled to a jury trial (Resp. Br. 17); indeed, respondents strongly imply that this presumption requires any cause of action that includes factual issues relating in any way to contract breaches or to torts to be classified as an action at law (Resp. 17, 27-28). Respondents are wrong.

Beacon Theatres, *Dairy Queen* and *Ross* treat with the need to adapt Seventh Amendment law to the merger of law and equity (and the other major procedural reforms) brought about by the 1938 adoption of the Federal Rules of Civil Procedure. In essence, each involved a situation in which, prior to merger, a court of equity might itself have tried (or have enjoined the trial) of *purely legal claims* due to the perceived inadequacies of the procedures available in the pre-merger law courts. In essence, these three cases held that the merger of law and equity

[4] Although this argument was never raised below, it has been repeatedly—*and unsuccessfully*—raised to this Court before. Indeed, in many of the cases cited in text, the same *amicus curiae*, represented by the same counsel has raised virtually the identical argument, and the Court has repeatedly declined to adopt it. *See, e.g., DelCostello, supra*, No. 81-2386, *Amicus Curiae* Brief of Teamsters for a Democratic Union ("TDU"); *Hines v. Anchor Motor Freight, supra*, No. 74-1024, *Amicus Curiae* Brief of PROD, Inc. (a predecessor of TDU).

removed these procedural bases for treating as equitable a cause of action that is *otherwise purely legal* in nature.[5]

Thus, in each of these cases, the Court found a jury trial right only because *clearly legal causes of action* were to be adjudicated, albeit in proceedings in which equitable claims were also to be adjudicated and in which, prior to merger, an equity court might have prevented any jury trial of the legal claims. And, the Court extended the

[5] *Beacon Theatres* involved the joinder of a plaintiff's action to enjoin defendant's prosecution of anti-trust claims with the defendant's counterclaims for anti-trust damages. Both sets of claims presented the same factual issues. The courts below had permitted the trial of the injunction request without a jury before any trial of the legal counterclaims, even though this would effectively prevent any later jury trial of the legal counterclaims. Although a pre-merger court of equity could have tried the equitable claim without a jury and, to protect its jurisdiction, could have enjoined later suits at law, this Court reversed, holding that, after merger, where equitable and legal claims presenting common issues of fact are joined, the right to a jury trial must be preserved by trying the legal claims first.

Dairy Queen involved a complaint alleging breach of contract and trademark infringement and seeking both damages and injunctive relief, including an accounting of defendant's funds. The courts below had denied defendant's jury trial demand on the basis that the legal contract claim for damages was "incidental" to the equitable claim for an accounting. Although pre-merger equity courts could try legal claims "incidental" to equitable claims—and thereby deny jury trials to those claims—this Court reversed, holding that, after merger, legal claims could not be denied a jury trial because they might be deemed "incidental" to related equitable claims.

Ross involved a derivative action by stockholders seeking to assert their corporation's legal claims to damages for breaches of contracts and for negligence. Although only equity courts had allowed derivative standing—and would then go on to try legal claims without juries once granting such standing—the Court held that, after merger, the purely legal claims of the corporation could be tried to a jury, once derivative standing was established.

jury trial right *only to the adjudication of those purely legal causes of action.*[6]

Beacon Theatres, Dairy Queen and *Ross* are thus of no comfort to respondents here. Those precedents affirmed the right to a jury trial of claims that are properly characterized as legal, even where equity courts might have entertained such legal claims for procedural reasons. That is clearly not the situation here. As we have shown, the respondents' cause of action cannot fairly be said to be legal rather than equitable. Nor did the 18th century courts of equity act as fora for analogous claims for reasons of procedure. Rather, the equity courts were the only fora which recognized and enforced the substantive duties of trustees and the substantive rights of trust beneficiaries.

II. The Nature of the Remedies Sought

Respondents urge that because they seek compensation for lost wages and lost employee benefits in this action, the relief must be characterized as legal rather than equitable for Seventh Amendment purposes. Resp. Br. 29-44. There is no such equation of backpay with *legal* relief.

A. In our initial brief, we pointed out that the remedy sought by respondents in this case is precisely the form of equitable relief that trust law recognized—and

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[6] *See Beacon Theatres, supra,* 359 U.S. at 504 (counterclaim alleged anti-trust claims for treble damages to which "the right to trial by jury applies"); *Dairy Queen, supra,* 369 U.S. at 477 (protecting right to a jury trial for "action on a debt allegedly due under a contract," noting that "it would be difficult to conceive of an action of a more traditional legal character"); *Ross, supra,* 396 U.S. at 538-539 & 542 (corporation is real party in interest and thus has a right to jury trial in contract and negligence actions for damages; explicitly refraining from deciding whether any other claims should be tried to jury).

recognizes—as appropriate in cases of a trustee's breach of duty (*see* Pet. Br. 23-24):

> It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. . . . The beneficiaries . . . may demand that they be placed in the same financial situation as if the wrong had not been perpetrated." [G. Bogert & G. Bogert, Handbook of the Law of Trusts, § 157 at 562, 564 (5th ed. 1973); *see also* sources cited at Pet. Br. 23-24.]

Respondents' brief contains no answer at all to our point: respondents arguments regarding remedies studiously *ignore* this basic rule of the law of trusts.[7]

B. We also noted that this Court has accepted the characterization of backpay as equitable in a number of federal labor statutes, most prominently in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whose remedial scheme—like that of the duty of fair representation—is modeled on the NLRA.[8] In so doing, the Court has recognized that these statutes—which rest

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[7] In an effort to support their assertion that "the compensation principle" must be associated with "the common law" (Resp. Br. 29), respondents quote material which is in no way inconsistent with our point that Equity could offer full monetary compensation to redress equitable wrongs. *See* Resp. Br. 29-30 n.11 (quoting 2 J. Story, Commentaries on Equity Jurisprudence, § 794 at 133 (6th ed. 1853). All that Story says is that for "wrongs and injuries cognizable at [the common] law," Equity would not "give redress by way of compensation or damages," since "there is a perfect remedy therefore at law." *Id.* Equitable injuries, however —such as injuries from a breach of trust—were, of course, not cognizable at common law, and full compensation was available only in Equity.

[8] *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (noting that Title VII backpay remedy was modeled on NLRA); *Electrical Workers v. Foust, supra,* 442 U.S. at 47, 52 (noting that design of DFR remedies must effectuate remedial policies of NLRA).

on a general policy of full compensation for injuries—eschew mechanical remedial decisions and instead promote the exercise of remedial discretion as a means of avoiding injustices.[9]

Although respondents admit that where there is room for remedial discretion, backpay may be said to be equitable (Resp. Br. 32), they urge that DFR backpay must be understood as an inflexible entitlement of a different order than backpay under Title VII or the NLRA. Resp. Br. 30-38.

Respondents argue that that the remedial "policies of Title VII and the NLRA [are] inapposite" to DFR actions, because those policies rest on the particular concerns and histories of those statutes. Resp. Br. 31-38. But, again, the "backpay provision [of Title VII] was expressly modeled on the backpay provision of the [NLRA]," *Albemarle, supra*, 422 U.S. at 419. And, of course, the DFR action was also derived—albeit by implication—from the NLRA. As we have noted, in formulating DFR remedial policies, this Court has looked to the NLRA as the principal source of relevant law. *Foust, supra*, 442 U.S. at 49; *see also id.* at 47 (looking to the Railway Labor Act).

Since the DFR, as an implied cause of action, obviously has no statutory language or legislative history other than those of the statutes from which the duty was implied, it is disingenous to urge—as respondents do—

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[9] *See generally Albemarle Paper Co., supra*, 422 U.S. at 413-425; *id.* at 441-447 (Rehnquist, J. concurring). *See also id.* at 424-425 (overall policy of compensation injuries is not undermined by denying backpay where party "prosecuted in eccentric fashion, prejudicial to other party"); *NLRB v. Flite Chief*, 640 F.2d 989 (9th Cir. 1981) (NLRA backpay may be reduced where employee attempted to commit fraud in the proceedings); *American Navigation Co.*, 268 NLRB 426, 417-428 (1983) (same).

that the history and language of the NLRA is irrelevant to this case.[10]

Respondents also point to this Court's statement in *Electrical Workers v. Foust, supra*, 442 U.S. at 48-49, that DFR remedies should seek "to ensure full compensation" and to similar language in other cases, to argue that absolutely no discretion should exist in the awarding of DFR backpay. *See* Resp. Br. 30; *see also id.* at 38 (citing *Bowen, supra*, 459 U.S. at 223). But none of these sources place DFR backpay on any different standard than Title VII or NLRA backpay, since those statutes are also founded on strong policies in favor of "make whole" relief. *See Albemarle, supra*, 422 U.S. at 418-422 (surveying history of Title VII and NLRA policies of "make whole" relief). Indeed, respondents' reliance on *Foust* is wholly misplaced since the *Foust* Court explicitly looked to the "'essentially remedial' objectives of the [NLRA]" as a principal source of duty of fair representation remedial policy. *Foust, supra*, 442 U.S. at 52.

Finally, respondents point to the fact that DFR actions are independent court actions, not subject to the exclusive jurisdiction of the National Labor Relations Board. *See Vaca v. Sipes*, 386 U.S. 171, 182 n.8, 183 (1967). Although this point is repeatedly made by respondents, and urged as a reason why the NLRA's remedial policies should be ignored when characterizing DFR backpay, re-

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[10] Respondents urge that the equitable nature of Title VII backpay is "inapposite" to this case because Congress, in passing Title VII, specifically considered and rejected proposals for jury trials. The duty of fair representation has no similar history, according to respondents. Resp. Br. 33.

Not only does this argument ignore the fact that Title VII remedies were modeled on NLRA remedies, but it also ignores that Congress, when drafting the NLRA, considered and *specifically rejected* the use of juries in that scheme. *See* Pet. Br. 10 (citing legislative history); *cf. Electrical Workers v. Foust, supra*, 442 U.S. at 51 n.14 (noting possible juror bias problems in labor cases); *Automobile Workers v. Russell*, 356 U.S. 634, 651 (1958) (Warren, C.J. dissenting) (same).

spondents never explain why this conclusion follows. *See* Resp. Br. 37-40. There is certainly no inconsistency between allowing an individual a direct action in the courts, and at the same time looking to the NLRA as a model for the remedial scheme the courts are to follow. Indeed, that is precisely what Congress did in Title VII and what this Court did in *Foust*.

C. None of this is to argue, of course, that DFR actions should adopt every arguably analogous NLRA (or Railway Labor Act or Title VII) remedy rule. But against this background, if DFR backpay is to be considered purely "legal," surely there must be some reason rooted in federal labor policy to explain why equitable concerns should play a lesser role in DFR cases than in Title VII or NLRA cases. Respondents give no such reason.

That is not surprising. For there are, in fact, powerful reasons rooted in federal labor policy why equitable remedial discretion should play *a far greater* role in DFR litigation arising from grievance and arbitration processes than in other fields.

Since the normal remedial goal in a case such as this must be to place a successful plaintiff in the position he would have been in had there been no union breach, the remedy must consider the full range of equitable concerns that would have influenced the outcome of a fair arbitration. And, of course, equitable discretion plays a paramount role in an arbitrator's determining the scope of rights—and more important—the scope of remedies under a collective bargaining agreement. Since federal labor policy recognizes that the parties rely on such discretion to elaborate the very meaning of their agreement—and that the stability and success of the bargaining process requires such reliance—it would be particularly inappropriate to mandate that, in DFR litigation, monetary awards must ignore all relevant equitable concerns and instead conform to the traditional and rigid rules of the common law. *See* Pet. Br. 26-30.

Respondents do not deny the centrality of equitable discretion in administering and elaborating the typical collective bargaining agreement and in labor arbitration. Yet, with little analysis, they do deny that a court in crafting a DFR remedy ever needs to take account of what the likely arbitral remedy for the alleged contract breach would have been. Resp. Br. 38-40. In essence, respondents assert that—regardless of the equitable nature of their original claims and of their originally claimed relief—they are now common law claimants with a full right, if successful, to the mechanical awarding of full and traditional common law remedies.

This assertion is, of course, neither good labor policy nor good Seventh Amendment analysis; respondents' arguments should thus be rejected.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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